UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRIAD WENCO, LLC

and **Case No. 29-CA-165942**

FAST FOOD WORKERS COMMITTEE

BRIEF OF RESPONDENT BRIAD WENCO, LLC IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

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Pursuant to 29 C.F.R. Section 102.46, Respondent Briad Wenco, LLC ("Respondent" or "Briad") submits this Brief in Support of its Exceptions (filed contemporaneously herewith) to the Decision and Order (the "Decision") of Administrative Law Judge ("ALJ") Joel P. Biblowitz, dated July 6, 2016.

Respondent hereby adopts, as if fully set forth herein, the stipulated facts and exhibits contained in the Joint Motion To Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts submitted by Respondent, the Counsel for the General Counsel (the "CGC"), and the Fast Food Workers Committee (the "FFWC").

STATEMENT OF THE CASE

Briad generally asks its new employees to sign as part of their new hire paperwork an arbitration agreement (hereinafter, the "Arbitration Agreement") which requires employees who execute it to waive their right to maintain class and collective actions in arbitral and judicial forums with respect to those claims that are subject to arbitration under the Arbitration Agreement (hereinafter, the "Class Action Waiver").[1] The CGC alleges that by maintaining the Arbitration Agreement which includes the Class Action Waiver, Briad has violated Section 8(a)(1) of the National Labor Relations Act (the "Act") by interfering with employees Section 7 rights. The CGC further alleges that the Arbitration Agreement runs afoul of the Act since, according to the CGC, employees who sign the Arbitration Agreement reasonably would believe

[1] The arbitration agreements at issue in this proceeding were attached as Exhibits 1 through 3 to the Factual Stipulation submitted by the parties and are also excerpted in large part in the ALJ's Decision (*See* Decision 2:19 – 11:3). The Factual Stipulation was attached as Joint Exhibit 2 to the Joint Motion To Transfer Proceedings. Briad maintains three versions of the Arbitration Agreement: a version for New York employees, a version for New Jersey employees, and a version for Pennsylvania employees. The three versions of the Arbitration Agreement are substantively identical other than the references to specific state laws contained therein. Any differences between the three versions are not material to the matters at issue in this proceeding.

that their signing of it "bars or restricts them from filing charges with the Board and/or restricts their access to the Board's processes."[2]

On July 6, 2016, the ALJ issued the Decision, concluding that Respondent violated Section 8(a)(1) of the Act "by requiring the employees to waive the right to maintain class or collective actions and restrict the employees from filing charges with the Board."[3] In the Decision, the ALJ further issued a recommend order requiring, among other things, that Respondent cease and desist from maintaining and enforcing the Arbitration Agreement.[4]

Respondent respectfully asks that the Board reject the Decision and dismiss the Complaint in its entirety with prejudice because, as further set forth below, maintenance of the Arbitration Agreement does not violate the Act and the Arbitration Agreement cannot reasonably be construed by employees to restrict them from filing charges with the Board or accessing its processes because paragraph 11 of the Arbitration Agreement explicitly states that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including but not limited to, ….*the National Labor Relations Board*…. in connection with any claim such employee may have against the company." (Emphasis added.)[5]

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[2] Joint Exhibit 1(j) at ¶4(a).

[3] Decision 12:47-48, 13:1-2.

[4] *See* Decision 13:4-44, 14:1-16.

[5] In the interest of brevity, Respondent respectfully refers the Board to the Joint Motion and Statement of Facts for background information on the parties to and procedural posture of this matter leading up to the Decision.

MATERIAL QUESTIONS INVOLVED

1. Whether the ALJ erred in concluding that Briad violated Section 8(A)(1) of the Act by unlawfully interfering with employees' Section 7 rights through its maintenance of the Arbitration Agreement which contains the Class Action Waiver.[6]

2. Whether the ALJ erred in concluding that Briad violated Section 8(A)(1) of the Act by restricting employees' access to the Board and/or from filing charges with the Board through its maintenance of the Arbitration Agreement (notwithstanding clear language to the contrary in paragraph 11 of the Arbitration Agreement).[7]

ARGUMENT

I. The ALJ Should Have Upheld the Arbitration Agreement's Class Action Waiver Because No Exception to the FAA Mandate Applies.

The ALJ erred by rejecting Respondent's argument that the Arbitration Agreement is lawful pursuant to the Federal Arbitration Act (the "FAA").[8] As further explained below, the Board's prior decisions invalidating arbitration agreements containing class action waivers should be overruled and the Board should instead follow governing U.S. Supreme Court

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[6] Exceptions 1-8, 15-28. Moreover, in the Decision, the ALJ asserted that Briad employees "were required to agree to [the terms of the Arbitration Agreement] in order to become or remain employees of the Respondent" and that acknowledging the Arbitration Agreement otherwise was "a condition of employment." (Decision 11:50 – 12:2; 13:6-10.) However, there is no support for this assertion in the stipulated factual record. In fact, as is relevant to this issue, the parties only stipulated that Respondent "generally asked new employees to sign [the Arbitration Agreement] as part of their new hire paperwork." (*See* Factual Stipulation at paragraph C.) It is not clear from the Decision whether the ALJ would have reached a different conclusion regarding the validity of the Arbitration Agreement had the ALJ properly considered the stipulated factual record. Regardless, Respondent highlights this discrepancy to the Board to ensure that it properly considers the factual record before it when considering Respondent's appeal of the Decision.

[7] Exceptions 9-25.

[8] Decision 12, fn 2. *See also generally id.* at 11:7 – 12:2.

decisions which require the upholding of arbitration agreements of the type at issue in the instant matter.

Section 2 of the FAA provides that private agreements to arbitrate, such as the Arbitration Agreement at issue here, are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2016). In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the seminal decision respecting the dominion of the FAA, the Supreme Court described this provision as reflecting two important principles. First, "that arbitration is a matter of contract." *Id.* at 339; *see also DIRECTTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (reversing state appeals court's invalidation of class-action waiver based on failure to place arbitration contract "on equal footing with all other contracts"); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989) (noting that the "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms" and the parties are free to "specify by contract the rules under which the arbitration will be conducted."). Second, the FAA evinces a "'liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) ("The [FAA] reflects an emphatic federal policy in favor of arbitral dispute resolution.") (internal quotations and citations omitted). "Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes[.]" *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). This policy applies with equal force in the employment context. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

In keeping with the "liberal federal policy favoring arbitration," the Supreme Court has made clear that under the FAA, arbitration agreements must be "enforce[d] . . . according to their terms," unless one of the following exceptions applies: (1) the FAA savings clause is triggered, or (2) the FAA is overridden by a "contrary congressional command." *Concepcion*, 563 U.S. at 339; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Since neither exception applies to the Class-Action Waiver set forth in the Arbitration Agreement, Supreme Court precedent mandates that it is lawful.

a. The FAA's "Saving Clause" Does Not Offer an Exception to Class Waivers Because Class and Collective Actions Are Procedural Mechanisms, Not Substantive Rights.

The FAA's saving clause provides that arbitration provisions may be struck down "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court in *Concepcion* unambiguously held that the "saving clause" does not apply to class-action waivers. 563 U.S. at 344. While the "saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," *Id.* at 339 (internal quotations omitted), the Supreme Court concluded that a ban on class waivers does not fall under the purview of these traditional contract defenses. *Id.* at 343-44. Indeed, such a ban would "stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343.

Despite the Supreme Court's unambiguous ruling in *Concepcion*, the NLRB has tried to use the FAA's "saving clause" to argue that the FAA permits striking down class-action waivers under the guise of preserving "substantive" Section 7 rights. *See In Re D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)), for the proposition that the FAA does not permit parties to "forgo the substantive rights

afforded by … statute," despite the fact that *Gilmer* upheld class waivers as non-substantive rights in the ADEA context).

In response, Circuit Court of Appeal have found that class mechanisms are *procedural*, not substantive, and overturned Board decisions holding otherwise. *See D.R. Horton, Inc.*, 737 F.3d 344, 359-60 (5th Cir. 2013) (holding that no substantive right to class or collective proceedings exists under NLRA and that a contrary holding would frustrate the FAA); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015) (citing its prior decision in *D.R. Horton, Inc.* and again overturning the Board and holding that "use 'of class action procedures ... is not a substantive right' under Section 7 of the NLRA"); *see also Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.");[9] *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (proceeding collectively under the FLSA is a matter of procedure, not a substantive right); *Horenstein v. Mortg. Mkt., Inc.,* 9 F. App'x 618, 619 (9th Cir. 2001) ("Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute"); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784, 788 (E.D. Ark. 2012) ("collective proceedings under FLSA are a matter of procedure, not substance"). *Accord, Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002) and *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996).[10]

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[9] Fed. R. Civ. P. 23 provides for the class action mechanism and sets forth the procedures for same.

[10] *But see Lewis v. Epic Sys. Corp.*, No. 15-2997, 2016 U.S. App. LEXIS 9638, at *23 (7th Cir. May 26, 2016) (finding right to collective action under Section of the Act to not merely be procedural in nature). As noted below, the *Lewis* court's decision, which the ALJ relied upon in part (Decision 11:27-48), goes against the vast majority of courts that have decided on this issue. Moreover, even the *Lewis* court acknowledged in its decision that the class/collective action

Simply stated, *Concepcion* and related case law are clear that the "saving clause" does not apply to class-action waivers.

b. There is No Congressional Command for Class Procedures that Overrides the FAA's Mandates.

The Supreme Court offered a narrow, second exception to the FAA in *Compucredit Corporation*, 132 S. Ct. at 669. There, the Court held that courts must enforce arbitration agreements according to their precise terms unless "the [FAA's] mandate has been overridden by a contrary congressional command." *Id.* (internal quotations and citation omitted). The *Compucredit* Court also warned, in no uncertain terms, that if a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673. Again, any attempt to apply this exception to the NLRA and class waivers has been tried and found wanting.

Nothing in the NLRA's text or legislative history suggests that Congress intended to ban class-action waivers in arbitration agreements. Section 7 does not even use the word "arbitration," nor does it mention the right to particular procedural options to resolve legal claims. As the Fifth Circuit explained in *D.R. Horton*:

> [G]eneral language is an insufficient congressional command, as much more explicit language has been rejected in the past. Indeed, the text does not even mention arbitration. By comparison, statutory references to causes of action, filings in court, or allowing

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mechanism is a procedural mechanism, referring to it as a "collective <u>process</u>". *Id.* at *26 (emphasis added). Where the *Lewis* court erred, but virtually every other court to consider the issue has gotten right, is that the corollary of the premise that a class mechanism is a process and not a substantive right is that class procedures may be waived by contract. *See Gilmer*, 500 U.S. at 26, 32. The FAA, therefore, mandates the enforcement of such waivers. *See e.g., D.R. Horton, Inc.*, 737 F.3d at 357*; Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1052-53 (8th Cir. 2013)*; Cellular Sales of Mo., LLC v. NLRB,* Nos. 15-1620, 15-1860, 2016 U.S. App. LEXIS 10002*,* at *7-8 (8th Cir. June 2, 2016)*; Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 295-98 (2d Cir. 2013).

> suits all have been found insufficient to infer a congressional command against application of the FAA.

737 F.3d at 360 (finding no "congressional command against application of the FAA" to class-action waivers based on review of the NLRA's text and legislative history); *see also Richards v. Ernst & Young, LLP*, 734 F.3d 871, 873-74 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 355 (2014); *Sutherland,* 726 F.3d at 297-98, n.8; *Owen*, 702 F.3d at 1055; *Vilches v. Travelers Cos., Inc.*, 413 F. App'x 487, 494 (3d Cir. 2011); *Carter,* 362 F.3d at 298; *Adkins,* 303 F.3d at 503; *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Horenstein*, 9 F. App'x at 619; *Carey v. 24 Hour Fitness USA, Inc.*, No. H-10-3009, 2012 U.S. Dist. LEXIS 143879, at *5 (S.D. Tex. Oct. 4, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) ("Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act"); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012) ("Because Congress did not expressly provide that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement according to its terms").

Like the "saving clause," any "congressional intent" argument is inconsistent with settled Supreme Court precedent and a myriad of lower court decisions. Since the NLRA "is silent on whether claims under [it] can proceed in [arbitral form], the FAA requires the arbitration agreement be enforced according to its terms." *Compucredit*, 132 S. Ct. at 673.

II. Controlling Jurisprudence Mandates that the Board Uphold Class Waivers Contained in Arbitration Agreements.

The Supreme Court of the United States has consistently upheld arbitration provisions, such as Briad's, under which parties waive their right to participate in class or collective actions. *See DIRECTTV,* 139 S. Ct. 463; *Concepcion*, 563 U.S. at 339; *American Express Co. v. Italian*

Colors Rest., 133 S. Ct. 2304 (2013); *CompuCredit Corp.*, 132 S. Ct. 665; and *Gilmer.* 500 U.S. at 35.

Indeed, Circuit Courts – including the Second Circuit – have overturned decisions that invalidate class waivers. For example, in *D.R. Horton, Inc. v. N.L.R.B.*, the Fifth Circuit set aside the NLRB's decision to invalidate an arbitration agreement with a class waiver clause. *In Re D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), *reversed by, D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 355 (5th Cir. 2013). There, the Court concluded that neither the NLRA, its legislative history, nor any policy consideration contain any congressional command to override the FAA. 737 F.3d at 360. Thus, the *D.R. Horton* Court held that an individual's right to bring a class or collective action is properly waivable in an arbitration agreement. *Id.* at 362. Further, the Court noted: "Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable." *Id.* (citations to Second, Eighth and Ninth Circuit cases omitted).

Last October, the Fifth Circuit reinforced its *D.R. Horton* holding. *See Murphy Oil Usa, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014), *reversed by, Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). The Court did not even find it necessary to "repeat its analysis[.]" 808 F.3d at 1018.[11] However, the Fifth Circuit explained that the NLRB was constrained to follow

[11] Notably, the NLRB's *Murphy Oil* decision and many which followed it have not been without vocal dissent. *See Murphy Oil Usa, Inc.*, 361 NLRB No. 72 (quoting the Supreme Court and explaining "The Board has not been commissioned to effectuate the position of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives") (Member Miscimarra, dissenting) ("This stance creates a clear conflict not only with Supreme Court precedent … but also with every Federal court that has granted one of the motions to compel arbitration the majority today finds unlawful") (Member Johnson, dissenting); *Bristol Farms and Konny Renteria*, 363 NLRB No. 45 (Nov. 25, 2015) (Member Miscimarra,

controlling law and only avoided a contempt holding "to restrain it from continuing its nonacquiescence practice with respect to th[e] court's directive" because it could claim confusion as to which Circuit Court the defendant might have appealed. *Id.* (internal quotations omitted). The Fifth Circuit further admonished: "The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders." *Id.* at 1021.

In June 2016, just a couple of months ago, the Eighth Circuit reversed the Board and held that an employer "did not violate section 8(a)(1) by requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes." *Cellular Sales of Mo., LLC,* 2016 U.S. App. LEXIS 10002, at *8.

Significantly, the Second Circuit – *which is likely the court that would hear the appeal from any enforcement order in this action* – has explicitly declined to follow the Board's conclusion in *D.R. Horton* that class-action waivers violate the NLRA. *See Sutherland,* 726 F.3d at 297-98, n.8 ("[W]e decline to follow the decision in *D.R. Horton*. Even assuming that *D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning.") (internal quotations and citation omitted); *see also Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71, 80 (S.D.N.Y. 2015) ("Drawing upon the Second Circuit's analysis, this Court finds that the NLRA does not stand in the way of the FAA's command to enforce arbitration agreements 'according to their terms.'").

To the extent there remains any ambiguity as to how it should rule in the instant matter, the Board need only look to the legion of other circuit and district courts that have almost universally upheld class-action waivers and rejected the NLRB's position:

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dissenting); *Price-Simms, Inc.*, 363 NLRB No. 52 (Nov. 20, 2015) (Member Miscimarra, dissenting).

- **2nd Circuit:** *Sutherland,* 726 F.3d at 297-98 n.8; *Parisi v. Goldman Sachs & Co.*, 710 F.3d 483 (2d Cir. 2013); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308 (BJJ)(JLC), 2012 U.S. Dist. LEXIS 5277, *20 (S.D.N.Y. Jan. 13, 2012); and *Patterson*, 96 F. Supp. 3d at 77.

- **3rd Circuit:** *Vilches*, 413 F. App'x 487; *Litman v. Tenet Healthsystem Phila., Inc.*, 655 F.3d 225 (3d Cir. 2011); *Quilloin v. Cellco P'ship*, 673 F.3d 221 (3d Cir. 2012); and *Brown v. Trueblue, Inc.*, No. 1:10-CV-0514, 2012 U.S. Dist. LEXIS 52811 (M.D. Pa. Apr. 16, 2012).

- **4th Circuit:** *Adkins*, 303 F.3d at 506.

- **5th Circuit:** *Carter*, 362 F.3d at 298; *D.R. Horton, Inc.*, 737 F.3d 344; *Murphy Oil USA, Inc.*, 808 F.3d 1013; and *Carey,* 2012 U.S. Dist. LEXIS 143879, at *5.

- **8th Circuit:** *Cellular Sales of Mo., LLC*, 2016 U.S. App. LEXIS 10002; *Owen*, 702 F.3d at 1054 and *Delock,* 883 F. Supp. 2d at 789.

- **9th Circuit:** *Richards*, 744 F.3d at 1075; *Horenstein,* 9 F. App'x at 619; *Kuehner,* 84 F.3d at 319-20; *Coleman v. Jenny Craig, Inc.*, No. 11cv1301-MMA (DHB), 2012 U.S. Dist. LEXIS 70789, at *7 (S.D. Cal. May 15, 2012); *Morvant,* 870 F. Supp. 2d at 845; *Jasso*, 879 F. Supp. 2d 1038; *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1083 (N.D. Cal. 2015), *motion to certify appeal denied*, 2015 U.S. Dist. LEXIS 85113 (N.D. Cal. June 30, 2015); and *Brown v. Citicorp Credit Servs., Inc.*, No. 1:12-cv-00062-BLW, 2015 U.S. Dist. LEXIS 85113, at *3 (D. Idaho Mar. 25, 2015).

- **11th Circuit:** *Caley*, 428 F.3d at 1378; *De Oliveira v. CitiCorp. N. Am., Inc.*, No. 8:12-cv-251-T-26TGW, 2012 U.S. Dist. LEXIS 69573 (M.D. Fla. May 18, 2012); and *Palmer v. Convergys Corp.*, No. 7:10-cv-145 (HL), 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. Feb. 9, 2012).

In short, any ruling that rejects the validity of Briad's class-action waiver would directly conflict with precedent set by the Supreme Court of the United States and the Circuit Court to which Briad likely would appeal. Accordingly, the Arbitration Agreement – and the class-action waiver that it that it contains – is unquestionably lawful.[12]

[12] As noted above, against the overwhelming weight of authority, the Seventh Circuit, which would *not* have jurisdiction over any appeal of this matter, recently held that an arbitration agreement with a class action waiver violated the Act. *See Lewis v. Epic Sys. Corp.*, 2016 U.S. App. LEXIS 9638.

III. The NLRB May Not Contravene Settled Precedent.

The NLRB is constrained to rule on this matter in a manner that is consistent with the holdings of the Supreme Court and the federal Circuit Courts. Indeed, it is the courts, not the NLRB, that "have the final word on matters of statutory interpretation." *See Ithaca Coll. v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (string citation omitted).

In addition, where, as here, an administrative tribunal's decision is "subject to direct judicial review[,]" then it must act as if it were a United States District Court. *Ithaca Coll.*, 623 F.2d at 228 (*citing, Morand Bros. Beverage v. NLRB*, 204 F.2d 529, 532 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953)). And, "as must a district court, an agency is bound to follow the law of the Circuit." *Ithaca Coll.*, 623 F.2d at 228 (*citing Mary Thompson Hospital, Inc. v. NLRB*, 621 F.2d 858 (7th Cir. 1980)); *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979); *NLRB v. Gibson Prods.*, 494 F.2d 762, 766 (5th Cir. 1974); *Stacey Mfg. Co. v. Comm'r of Internal Revenue*, 237 F.2d 605, 606 (6th Cir. 1956); *cf. DIRECTTV, Inc.,* 139 S. Ct. at 468 ("No one denies that lower courts must follow this Court's holding in *Concepcion*. . . . The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.").

By way of example, the court in *Ithaca College* recognized the "practice of the Board to refuse to follow unfavorable decisions from the Courts of Appeals even in instances such as this where it is likely that the case will come up for review before the very court with which the Board disagrees." 623 F.2d at 228 (string citation omitted). The *Ithaca College* Court explained that it does not expect the NLRB, or any litigant for that matter, to "rejoice in all the opinions of this Court." *Id.* at 228. However, all litigants are expected to abide by those decisions and, to

the extent there is any disagreement, they may "seek review in the Supreme Court." *Id.*[13] Under no circumstances, however, may the NLRB "choose to ignore the decision as if it had no force or effect." *Id.* The Second Circuit went on to admonish that:

> Absent reversal, that decision is the law which the Board must follow. The Board cites no contrary authority except its own consistent practice of refusing to follow the law of the circuit unless it coincides with the Board's views. ***This is intolerable if the rule of law is to prevail.***

Id. (emphasis added); *see also NLRB v. HMO Int'l/Cal. Med. Grp. Health Plan, Inc.*, 678 F.2d 806, 809 (9th Cir. 1982) (granting no deference to the NLRB where "the Board has ignored a controlling legal standard. That has occurred in this and similar cases"); *Case Farms of N.C., Inc. v. NLRB*, 128 F.3d 841, 850 (4th Cir. 1997) ("The Board is not free, however, to automatically assume that its decisions, whether enforced or not, are the law in this Circuit").

IV. The ALJ Erred In Finding That Employees Who Sign the Arbitration Agreement Would Reasonably Believe That Their Signing Of It Restricts Them From The Board or its Processes.

The ALJ erred in finding that the Arbitration Agreement violates the Act as alleged in the Complaint because employees would reasonably believe that the Arbitration Agreement restricts them from access to the Board and/or filing charges with the Board.[14]

Simply put, the Arbitration Agreement cannot reasonably be construed by employees to restrict them from filing charges with the Board or accessing its processes because paragraph 11 of the Arbitration Agreement explicitly states that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or

[13] Before or during the pendency of an appeal on such issues, "it would be reasonable for the Board to stay its proceedings in another case that arguably falls within the precedent of the first one." *Ithaca Coll.*, 623 F.2d at 228.

[14] Decision 12:4-37.

participating in any investigation or proceeding conducted by an administrative agency, including but not limited to, ….**the National Labor Relations Board**…. in connection with any claim such employee may have against the company." (Emphasis added.) Notwithstanding this simple and unambiguous language, the ALJ erroneously concluded that an employee would need to "apply legal analysis" and "carry law books" to understand that the Arbitration Agreement does not prevent employees from accessing the Board.[15]

In support of the forgoing conclusion, the ALJ mistakenly found that paragraph 2 of the Arbitration Agreement (which delineates the claims subject to the Arbitration Agreement and Class Action Waiver) was "unequivocal" in stating that "any claim, controversy or dispute must be resolved by individual arbitration" and that therefore the unambiguous language in paragraph 11 (regarding employees' rights to access the Board) was to no avail.[16] In truth, paragraph 2 is not "unequivocal" by any means with respect to the claims covered by the Arbitration Agreement as it explicitly carves out "claims expressly excluded from arbitration in Paragraph 11 of this Agreement."[17]

Moreover, the Fifth Circuit, when confronted with similar language in an arbitration agreement overruled the Board and explicitly held that "it would be unreasonable for an employee to construe the [arbitration agreement] as prohibiting the filing of Board charges when the agreement says the opposite." *Murphy Oil USA, Inc.*, 808 F.3d at 1020. Here too, logic dictates that a Briad employee would not reasonably understand the Arbitration Agreement to restrict his or her access to the Board when the agreement explicitly says the exact opposite.

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[15] *Id.* at 12:24-27.

[16] *Id.* at 12:27-30.

[17] *Id.* at 3:17-19.

CONCLUSION

For all the foregoing reasons, the Board should overrule and reject the Decision, find that Respondent did not violate Section 8(a)(1) of the Act, and dismiss the Complaint in its entirety with prejudice.

Dated: New York, NY

August 3, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2016, a true and correct copy of the forgoing was filed with the Board via the Board's electronic filing system, and served by electronic mail upon the following:

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